Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA EX REL.
WILLIAM GARIBALDI AND CARLOS SAMUEL

Petitioners

v.

ORLEANS PARISH SCHOOL BOARD

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 60(b)(6) authorizes a district court to grant relief from a final judgment in "extraordinary circumstances," the determination of which is left to that court's sound discretion. The question presented is whether a district court may *never* exercise its discretion to grant relief under Rule 60(b)(6) on the basis of a change in the controlling decisional law—regardless of the facts and circumstances that accompany such change.

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PETITION FOR WRIT OF CERTIORARI

William Garibaldi and Carlos Samuel, for themselves and also for the United States Government, *see* 31 U.S.C. § 3730(b)(1), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. 1a-10a) is reported at 397 F.3d 334; a prior opinion of that court (App. 25a-41a) is reported at 244 F.3d 486. The opinion of the District Court for the Eastern District of Louisiana (App. 11a-24a) is unreported; a prior opinion of that court (App. 42a-83a) is reported at 46 F. Supp. 2d 546.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROCEDURAL RULE INVOLVED

Federal Rule of Civil Procedure 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time . . . .

STATEMENT OF THE CASE

As found by the jury and as confirmed by the district court in post-verdict proceedings, respondent Orleans Parish School Board ("the Board") "submitted more than 1500 false claims to the federal government over the course of 11 years." App. 12a. Petitioners William Garibaldi and Carlos Samuel ("the Relators") were employed in the Board's Audit Department; they discovered the fraud and reported it to their boss, the Superintendent of the Board. *See* App. 26a-27a. For their efforts, Samuel was fired and Garibaldi was suspended pending a termination hearing. *See* App. 28a.

A. Round One.

The Relators instituted a "*qui tam* action" against the Board in the United States District Court for the Eastern District of Louisiana. Pursuant to 31 U.S.C. § 3730(b)(1), the Relators asserted violations of the False Claims Act "in the name of the Government"; pursuant to § 3730(h), they also asserted that the Board had retaliated against them in violation of the Act's protections for "whistleblowers." *See* App. 28a. Following nine days of testimony, the jury found that the Board had submitted 1,570 false claims and had illegally retaliated against the Relators for bringing those claims to light; the jury further found that the Government had suffered actual financial damages of $7.6 million as a result of the false claims, that the Relators had each sustained pain and suffering in the modest amount of $65,000 as a result of the illegal retaliation, and that Samuel had lost an additional $103,000 in wages for that same reason. *See id.* After trebling the Government's actual damages (to $22.8 million) and adding a penalty of $5,000 for each false claim ($7.85 million more) pursuant to 31 U.S.C. § 3729(a), the district court entered judgment against the Board for nearly $31 million. *See* App. 29a, 43a.

That amount was substantially reduced in post-verdict proceedings. In a lengthy ruling, the district court rejected most of the parties' attacks on the judgment, including the

Board's motion for judgment as a matter of law pursuant to Federal Rule 50(b). *See* App. 44a-65a. The court did, however, reduce the Government's actual damages by slightly more than $300,000; more significantly, the court exercised its discretion under Fifth Circuit precedent to eliminate almost entirely the civil penalty assessed against the Board, reducing it by more than 98% from $7.85 million to a mere $100,000. *See* App. 29a-30a. Having reduced the Government's recovery from nearly $31 million to just under $23 million, the district court reaffirmed its decision to award the Relators the very *minimum* percentage of the recovery to which they were entitled under 31 U.S.C. § 3730(d)(2), i.e., 25%. *See* App. 70a-71a.

The Board satisfied the portion of the judgment attributable to the Relators' claims of retaliation, but all parties appealed with respect to the judgment on the false claims. *See* App. 29a n.1, 30a. The Court of Appeals for the Fifth Circuit pretermitted all other issues in order to resolve "the issue we find dispositive, namely whether a local government such as the School Board may be held liable under the False Claims Act." App. 30a. Observing that those "district courts that have considered the issue are divided" and that the "issue is one of first impression for this court, and for the courts of appeal[s] generally," App. 31a, the Fifth Circuit answered the question in the negative.

The court of appeals relied largely on this Court's then-recent decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 785 (2000), said to be "conclusive" on the point that the "treble damages imposed by the False Claims Act are *punitive* damages." App. 34a n.5 (emphasis added). In light of the supposedly "well-settled presumption that governments, including local governments, are not subject to punitive damages," App. 34a, the court of appeals concluded that the "punitive damages regime of the False Claims Act shows a congressional intent that the False Claims Act should not be applied to local governments," App. 41a. Accordingly, the Fifth Circuit vacated

the $23 million judgment in favor of the Government and rendered judgment on the false claims in favor of the Board. *See* App. 41a.

The Relators then sought relief in this Court. As noted above, however, the Fifth Circuit was the very first court of appeals to consider whether local governments are subject to *qui tam* actions under the False Claims Act. Faced with a question of unmistakably first impression, this Court not surprisingly denied the Relators' petition for certiorari. *See* 534 U.S. 1078, *reh'g denied*, 534 U.S. 1172 (2002) (docketed as No. 01-510). With that denial, the Fifth Circuit's judgment on the false claims in favor of the Board became final.

B. The Interlude.

Not two months after the Court finally disposed of the Relators' petition, it received the petition of Cook County, Illinois, which sought review of the Seventh Circuit's decision finding that local governments are indeed amenable to *qui tam* actions. *See United States ex rel. Chandler v. Cook County*, 277 F.3d 969, 980 n.10 (7th Cir. 2002) (noting that this holding "creates an intercircuit conflict" with the Fifth Circuit's ruling in Relators' case) (docketed as No. 01-1572). Barely a month after receiving Cook County's petition, the Court received still another petition presenting the same question, this one from the Third Circuit. *See United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219, 225 (3d Cir. 2002) (holding, in accord with the Fifth Circuit in Relators' case, that "Congress did not intend to subject local governments to punitive damages under the [False Claims Act]") (docketed as No. 01-1711).

The Court soon granted Cook County's petition. In a *unanimous* opinion that cited the conflict between the decision under review and the decisions of the Third and Fifth Circuits in *Dunleavy* and in the Relators' case, respectively, this Court held that the "term 'person' in [the False Claims Act, 31 U.S.C. § 3729] included local governments in 1863 and nothing in the 1986 amendments redefined it." *Cook*

County v. United States ex rel. Chandler, 538 U.S. 119, 133 (2003); *see also id.* at 125 & n.6 (describing the circuit conflict). Contra the Fifth Circuit's reasoning in the Relators' case, *see* App. 34a-35a, the Court explained that "although *Stevens* recognized that the [Act's] treble damages remedy is still 'punitive' in that recovery will exceed full compensation in a good many cases, the force of this punitive nature in arguing against municipal liability is not as robust as if it were a pure penalty in all cases," for "[t]reble damages certainly does not equate with classic punitive damages." 538 U.S. at 131-32. The Court observed that the question in municipal defendant cases "is whether the local taxpayer should make up for an undeserved benefit, or the federal taxpayer be permanently out of pocket"—a question to be answered in any given case "by a combination of the [trial] judge's discretion and the Government's power to intervene and dismiss or settle an action." *Id.* at 132.

After issuing this decision, the Court granted the petition of the *Dunleavy* relators, vacated the Third Circuit's erroneous decision in favor of Delaware County, Pennsylvania, and remanded the case for reconsideration in light of *Cook County*. *See* 538 U.S. 918 (2003).

C. Round Two.

The unanimous decision in *Cook County* was handed down on March 10, 2003. On May 12, 2003, the Relators returned to the district court and sought relief from the Fifth Circuit's final judgment in favor of the Board in Round One. *See* App. 4a. The substantive basis for such relief was, of course, this Court's ruling in *Cook County* that local governments like the Board are indeed subject to *qui tam* actions under the False Claims Act. The procedural basis for the relief was Federal Rule of Civil Procedure 60(b), which provides that, "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment" for specified reasons, the sixth and final one being "any other reason justifying relief from the operation of the judgment."

As construed by this Court, Rule 60(b)(6) provides the district courts "with authority adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice", however, the rule "should only be applied in 'extraordinary circumstances.'" *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). Like all decisions to grant or deny relief under Rule 60(b), the determination whether extraordinary circumstances are present is committed to the district court's sound discretion, subject to review for abuse of that discretion. *See Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 & n.7 (1978).

The district court here exercised its discretion in favor of the Relators, expressly finding that "because of the extraordinary circumstances surrounding this case, the motion [for relief from the judgment] must be granted." App. 11a. The court acknowledged that "a simple 'change in decisional law' is not enough to trigger Rule 60(b)(6)," App. 23a, but it found that the present case involved more that a "simple" change, for essentially four reasons:

> (1) "But for [the Relators' case], there would not have been the two to one split upon which the Supreme Court ultimately based its grant of [certiorari in *Cook County*]." App. 23a.
>
> (2) *Cook County* "found the very basis for the Fifth Circuit's decision to be devoid of merit." *Id.*
>
> (3) That the Relators' case, the Third Circuit case, and the Seventh Circuit case "were all under consideration at substantially the same time and played a role in the Supreme Court's decision"—but of all *qui tam* plaintiffs in the three cases, the Relators alone got no benefit from that decision—"presents proof that enforcement of the judgment would work an injustice," indeed, a "substantial" injustice. *Id.*

> (4) "[I]t would be simple serendipity that determined that the federal taxpayer was to be permanently out of pocket the funds at issue herein. This course of action cannot be countenanced in the meting out of justice." App. 24a.[1]

Exercising its discretion in light of the foregoing, the district court found that "extraordinary circumstances exist and the [Rule 60(b)(6)] motion must be granted." *Id.* Accordingly, the court reinstated its prior amended judgment in favor of the Government and the Relators in respect to the Board's 1,570 false claims. *See id.*

On appeal, the Fifth Circuit reversed. The court did acknowledge that relief under Rule 60(b)(6) is appropriate in an "extraordinary situation" or "if extraordinary circumstances are present." App. 5a (quoting, respectively, *Klapprott v. United States*, 335 U.S. 601, 613 (1949), and *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 747 (5th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996)). What the court did ***not*** acknowledge, however, was the district court's discretion in general or its weighing of the equities in this case in particular. Instead, the Fifth Circuit simply performed its own, independent "examination of the details of the arguments for reopening the judgment." App. 7a. That examination yielded the conclusion that the "present case is not atypical of the many instances in which the Supreme Court has granted certiorari and rendered a decision resolving a circuit split." App. 6a. In other words, "we do not think the present case has any features that cause it to be exceptional to such a marked extent from other cases involving resolution of circuit conflicts." *Id.*

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[1] The district court could have advanced two more reasons: one, the case had already been fully tried to verdict, such that granting the Relators' motion did ***not*** necessitate a long-delayed retrial, with the attendant dangers of faded memories or otherwise stale evidence; and two, the original judgment in favor of the Board on the false claims was "unexecuted," in that no transfer of money or property had taken place as a result of that judgment.

In reaching its own, independent conclusion that the present case was neither atypical nor exceptional (and thus presented no "extraordinary circumstances"), the Fifth Circuit did two things of note. First, the court repudiated as "dicta unnecessary to [its] holding" the statement in *Batts* that "relief from judgment may be appropriate where the subsequent decision is closely related to the judgment from which relief is sought, 'such as where the Supreme Court resolves a conflict between another circuit ruling and that case.'" App. 7a (quoting *Batts*, 66 F.3d at 748 n.6).

Second, the Fifth Circuit confronted the Eleventh Circuit's decision in *Ritter v. Smith*, 811 F.2d 1398 (11th Cir.), *cert. denied*, 483 U.S. 1010 (1987). *See* App. 7a-9a. Using language that courts employ to denigrate a decision without expressly criticizing it—"*even if* we were to assume or agree [that *Ritter*] presented 'extraordinary circumstances' under Rule 60(b)(6)"—the Fifth Circuit found *Ritter* "clearly distinguishable," App. 7a (emphasis added), even as the court conceded that "[n]o two cases are truly identical," App. 10a.

Accordingly, the court of appeals reversed the district court's grant of relief under Rule 60(b)(6) and reinstated the erroneous-but-final judgment that had resulted from Round One. *See* App. 10a.

REASONS FOR GRANTING THE PETITION

Balancing the competing considerations of finality and consistency, this Court has opined that "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6). *Agostini v. Felton*, 521 U.S. 203, 239 (1997). This case presents the question whether, in saying *by themselves* and *rarely*, the Court actually meant *never*. The Fifth Circuit so ruled in the present case, and thereby issued a decision in conflict with the decisions of the Tenth and Eleventh Circuits on this important and recurring matter.

I. In Essentially Ruling that Rule 60(b)(6) Relief Can *Never* Rest on a Change in the Decisional Law, the Fifth Circuit's Decision Is in Conflict with the Decisions of Other Courts of Appeals.

Although the decision below does not purport to categorically prohibit relief under Rule 60(b)(6) premised on a change in the controlling decisional law, that is its essence. Despite the applicability of the abuse-of-discretion standard —and "the deference [to trial courts] that is the hallmark of abuse of discretion review," *GE Co. v. Joiner*, 522 U.S. 136, 143 (1997)—the Fifth Circuit *overturned* the district court's exercise of discretion to grant Rule 60(b)(6) relief. Before the decision below, the Fifth Circuit did the same thing in *Batts*, 66 F.3d at 751. Before *Batts*, the Fifth Circuit did the same thing in *Hess v. Cockrell*, 281 F.3d 212 (5th Cir. 2002). Before *Hess*, the Fifth Circuit did the same thing in *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 851 (5th Cir. 1990), and in *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir.), *cert. denied*, 498 U.S. 829 (1990). And so on.

To be sure, *Batts* does contain a footnote in which the Fifth Circuit—again, in the course of *overturning* a district court's grant of relief under Rule 60(b)(6)—opined: "We do not hold that a change in decisional law can never be an extraordinary circumstance." 66 F.3d at 748 n.6. But it was this very footnote, and particularly its reliance on the Eleventh Circuit's decision in *Ritter v. Smith*, that the decision below expressly repudiated as "unnecessary" "dicta." App. 7a; *see also id.* n.22 (citing *Batts*, 66 F.3d at 748 n.6). It is to the *Ritter* decision that we turn first.

A. The Eleventh Circuit's Decision in *Ritter v. Smith*.

In the first *Ritter v. Smith*, 726 F.2d 1505, 1517 (11th Cir. 1984), the Eleventh Circuit held that Alabama's capital sentencing scheme was "facially unconstitutional" because of a peculiar provision involving the pronouncement by the jury of a death "sentence" at the guilt phase. The court of

appeals ordered the district court to grant a writ of habeas corpus unless the petitioner Ritter was resentenced in the absence of this jury "sentence." *See id.* at 1519. This Court denied the state's petition for certiorari in due course, 469 U.S. 869 (1984), after which the court of appeals issued its mandate, and the district court entered judgment thereon. *See Ritter*, 811 F.2d at 1400. Thereafter, the Court granted certiorari in *Baldwin v. Alabama*, 469 U.S. 1085 (1984), to review the same sentencing scheme. In its decision on the merits, the Court expressly cited the conflict between *Ritter v. Smith* and the Alabama Supreme Court's decision in *Ex parte Baldwin*, 456 So. 2d 129 (Ala. 1984). *See Baldwin v. Alabama*, 472 U.S. 372, 374 (1985). The Court resolved the conflict in the state's favor, ruling that the jury "sentence" was "peculiar" but not "unconstitutional," and so affirmed Baldwin's capital sentence. *Id.* at 389.

In the second *Ritter v. Smith*, Alabama sought relief from the earlier final judgment in favor of Ritter premised on the change in decisional law wrought by *Baldwin*. The district court granted such relief under Rule 60(b)(6), and the Eleventh Circuit affirmed. The court concluded that the relevant decisions "plainly allow Rule 60(b)(6) relief where there has been a clear-cut change in the law"; however, "it is also clear that a change in the law will not always provide the truly extraordinary circumstances necessary to reopen a case." 811 F.2d at 1401. Thus, although "something more than a 'mere' change in the law is necessary to provide the grounds for Rule 60(b)(6) relief," several additional factors persuaded the court that "the circumstances are sufficiently extraordinary to warrant relief under Rule 60(b)(6)." *Id.*

The three principal factors identified by the Eleventh Circuit are equally present here:

> (1) "the previous, erroneous judgment of this court had not been executed," *id.*; *cf. supra* note 1 (noting that the same holds true with respect to the previous, erroneous judgment of the Fifth Circuit in the present case);

> (2) "there was only minimal delay between the finality of the judgment [Dec. 3, 1984] and the motion for Rule 60(b)(6) relief [Sept. 9, 1985]," *Ritter*, 811 F.2d at 1402; *cf.* App. 3a-4a (finality on Feb. 25, 2002; motion on May 12, 2003); and
>
> (3) "the close relationship between the two cases at issue, *Baldwin* and *Ritter*," namely, that this Court "granted certiorari in *Baldwin* for the express purpose of resolving the dispute between these two cases," *Ritter*, 811 F.2d at 1402; *cf. Cook County*, 538 U.S. at 125 & n.6 (noting that certiorari was granted to resolve the conflict between the decision below and the decisions of the Third and Fifth Circuits in *Dunleavy* and the Relators' case, respectively).[2]

Based on these considerations, the Eleventh Circuit upheld the district court's "finding that the particular facts of this case constitute such extraordinary circumstances." *Ritter*, 811 F.2d at 1404.

In the decision below, of course, the Fifth Circuit both sniffed at *Ritter v. Smith*—refusing explicitly to "assume or agree" that it was correctly decided—and found it "clearly distinguishable." App. 7a. Quite frankly, the distinctions drawn by the Fifth Circuit are so strained as to make outright disagreement with the Eleventh Circuit the far more cogent explanation for the result below.

First, the Fifth Circuit pointed out that "considerations of comity for state laws and state judicial decisions are not present in this federal question case." App. 8a. That is cor-

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[2] The Eleventh Circuit also cited "considerations of comity," i.e., the "state has a strong interest in assuring that constitutionally valid state court judgments are not set aside and can be carried out without undue delay." *Ritter*, 811 F.2d at 1403. As explained in the text below, however, the court significantly (if not wholly) retreated from these considerations later in its opinion.

rect as a technical matter, but *Ritter* made clear that such considerations were the least important of all. *See* 811 F.2d at 1403 (listing comity as the fourth of four considerations). More importantly, *Ritter* significantly (if not wholly) downplayed comity later in the opinion: "Were the roles in this case reversed, it is clear that Ritter could have received the benefit of an intervening favorable Supreme Court ruling inconsistent with a decision of our court." *Id.* at 1404. If a habeas petitioner who sought to *upset* the finality of a state-court judgment would receive the same benefit as the state that sought to *preserve* that judgment, then "it is clear" (as the Eleventh Circuit itself put it) that comity adds little, if anything, to the calculus. Indeed, the actual consideration would appear to be not comity, but *consistency*.

Second, the Fifth Circuit asserted that because of the Third Circuit's decision in *Dunleavy*, its erroneous decision in Round One "was not essential to the circuit split." App. 8a. But some sort of metaphysical essentiality was not the point made by *Ritter*; rather, the point was simply the "close relationship" between the erroneous prior decision and the decision by which this Court revealed the error, such closeness being manifested by an expressly recognized conflict. 811 F.2d at 1403. As noted above, such express recognition by this Court was functionally identical in both situations. *Compare Baldwin*, 472 U.S. at 374, *with Cook County*, 538 U.S. at 125 & n.6.

Third, the Fifth Circuit asserted that its erroneous decision in Round One was "not apt to have prospective effects analogous to those of an executory constitutional ruling affecting a state's capital sentencing procedures" like the first *Ritter v. Smith*. App. 8a. But the minor premise that the first *Ritter* had any lingering "prospective effects" is false. By the time the Eleventh Circuit heard the appeal from the grant of Rule 60(b)(6) relief, its prior decision had been declared erroneous by this Court in *Baldwin* and accordingly had "effects" in Ritter's case *alone*. Yet that singularity and lack of prospectivity did not stop the Eleventh Circuit from

agreeing with the district court that the circumstances were "sufficiently extraordinary to justify disturbing the finality of the judgment." 811 F.2d at 1402.

Fourth, the Fifth Circuit asserted that its erroneous decision in Round One was "more analogous to a fully executed judgment than to Ritter's 'unexecuted' judgment." App. 8a. This assertion is baffling. The court identified no money or other property that had changed hands as a result of the Round One judgment, nor did the court point to any other affected interest (like title to land) that the concept of finality is especially concerned to protect. In essence, that judgment was as much "unexecuted" as the judgment in the first *Ritter v. Smith*. Indeed, as in *Ritter*, relief in this case can be afforded without additional proceedings in the district court, given that the matter was fully tried to verdict (and underwent considerable post-verdict proceedings) in Round One.[3]

Finally, the Fifth Circuit observed that this case "does not arise from the same factual transaction as *Chandler*'s FCA suit against Cook County, Illinois." App. 9a. This observation is certainly true, but it hardly provides a basis for distinguishing *Ritter*: Ritter's case did not arise from the same "transaction" as Baldwin's. *Compare Ritter*, 811 F.2d at 1399 (murder of Edward Nassar) *with Baldwin*, 472 U.S. at 374 (murder of Naomi Rolon). Rather, the two cases involved the constitutionality of the same capital sentencing scheme, just as the present case and *Cook County* involve the proper interpretation of the same provision of the False Claims Act, 31 U.S.C. § 3729(a).

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[3] The Fifth Circuit noted here that "final civil judgments having the effect of res judicata, even if un-executed, are not voided or affected by a subsequent change in the decisional law on which they were based." App. 8a n.27. "Generally speaking," *id.*, this is no doubt true, but it begs the very question presented here—whether Rule 60(b)(6) can *ever* "affect" a final judgment in light of changes in the controlling decisional law.

In short, had the district court's exercise of discretion under Rule 60(b)(6) been reviewed in the Eleventh Circuit pursuant to *Ritter v. Smith*, it would have been sustained. In overturning that exercise of discretion, the Fifth Circuit issued a decision in conflict with the Eleventh Circuit.

B. The Tenth Circuit's Decision in *Pierce v. Cook & Co.*

On the same side of the divide as the Eleventh Circuit stands the Tenth Circuit. In the widely cited *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975) (en banc), *cert. denied*, 423 U.S. 1079 (1976), the court considered whether relief was available under Rule 60(b)(6) to reopen a judgment in light of an intervening decision of the Oklahoma Supreme Court. The case was a multi-plaintiff diversity action arising out of an automobile accident. The first *Pierce* decision affirmed a summary judgment for the defendant based on controlling Oklahoma precedent. *See* 437 F.2d 1119, 1122 (10th Cir. 1970) (citing *Marion Machine, Foundry & Supply Co. v. Duncan*, 101 P.2d 813 (Okla. 1940)). Another victim of that same accident litigated his claim in the Oklahoma courts and, more than three years after the Tenth Circuit decision became final, obtained a decision expressly overruling that Oklahoma precedent. *See Hudgens v. Cook Industries, Inc.*, 521 P.2d 813, 816 (Okla. 1973). The federal plaintiffs then returned to federal court seeking relief based on this change in the controlling decisional law. The Tenth Circuit granted that relief in the second *Pierce* decision.

Applying the rule that "in extraordinary situations, relief from final judgments may be had under Rule 60(b)(6), when such action is appropriate to accomplish justice," 518 F.2d at 723, the court found the situation "extraordinary" in large part because of the *relatedness* of the federal and state cases. That is, "the decisional change . . . came in a case arising out of the same accident as that in which the plaintiffs now before us were injured." *Id.*; *see also Ritter*, 811 F.2d at 1403 (observing that "the two relevant cases in

Pierce were closely related, thereby creating the extraordinary circumstances necessary for Rule 60(b) relief").

The Tenth Circuit also drew support from this Court's extraordinary actions in *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (per curiam), *discussed in Pierce*, 518 F.2d at 723. In *Gondeck*, the Fifth Circuit had overturned the Labor Department's award of death benefits to the survivor of an employee killed in a jeep accident outside of a defense base in the British West Indies. *Id.* at 26. The survivor sought review here, but the Court denied her petition for certiorari on June 11, 1962. 370 U.S. 918. The Court then denied her petition for rehearing on October 8, 1962. 371 U.S. 856. But on the survivor's motion for leave to file a *second petition for rehearing*, the Court granted the petition on October 18, 1965, *more than* ***three years*** *later*, and reversed the Fifth Circuit's judgment.

The Court was motivated to this extraordinary action by the Fourth Circuit's intervening decision upholding the Department's award to the survivors of another employee killed in the same accident. *See* 382 U.S. at 26-27. In addition to these "intervening circumstances," the Court acted because "the Fifth Circuit misinterpreted the [governing] standard in this case" and further because "of those eligible for compensation from the accident, this petitioner stands alone in not receiving it." *Id.* at 28. These circumstances implicated the maxim that "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of [the Court's regular] rules." *Id.* at 26-27 (quoting *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957)); *see also id.* at 30 (Harlan, J., dissenting) ("The result reached in this case has been achieved at the expense of the sound legal principle that litigation must at some point come to an end.").[4]

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[4] The Eleventh Circuit's decision in *Ritter*, 811 F.2d at 1403, also drew support from *Gondeck*.

Although the Tenth Circuit's decision in *Pierce* is several decades old, it retains vitality and has been extended to the very situation of the present case: "In this circuit, a change in relevant case law by the United States Supreme Court warrants relief under [Rule] 60(b)(6)." *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989) (citing *Pierce*), *quoted in Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1491 (10th Cir. 1994); *see also Woods v. Kenan (In re Woods)*, 173 F.3d 770, 780 (10th Cir.) (relying on *Pierce* in upholding a bankruptcy court's reliance on Rule 60(b)(6) to reopen a case two years after it had been closed), *cert. denied*, 528 U.S. 878 (1999).[5]

In short, had the district court's exercise of discretion under Rule 60(b)(6) been reviewed in the Tenth Circuit pursuant to *Pierce v. Cook & Co.* and its progeny, it would have been sustained. In overturning that exercise of discretion, the Fifth Circuit issued a decision also in conflict with the Tenth Circuit. That conflict, in conjunction with the Fifth Circuit's additional conflict with the Eleventh Circuit's decision in *Ritter v. Smith*, warrants review by this Court.

II. The Authority of the District Courts to Grant Rule 60(b)(6) Relief Based on a Change in the Decisional Law Is a Recurring Question as to Which the Lower Courts Exhibit Confusion.

In addition to the conflict catalogued above, review is warranted because the question presented is both recurring and (in two respects) a source of confusion in the lower federal courts. We take up these points in turn.

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[5] Notably, the Eleventh Circuit in *Ritter* expressly relied on *Pierce* in discussing relatedness: "An analogous situation arises where the two cases are related, not because the supervening decision was rendered to resolve a conflict between them but because they arose out of the same transaction." *Ritter*, 811 F.2d at 1402-03 (discussing *Pierce*, 518 F.2d at 722-23).

The recurrence of decisional law-related issues under Rule 60(b)(6) is surprisingly robust. In addition to the decisions from the Fifth, Tenth, and Eleventh Circuits treated above, recent and representative decisions from the First, Second, Third, Fourth, Seventh, and Eighth Circuits are collected in 12 *Moore's Federal Practice* § 60.48[5][b] & n.45 (3d ed. 2005), *cited in Agostini v. Felton*, 521 U.S. at 239. In most of these decisions, relief is denied, doubtless reflecting the "extraordinary circumstances" principle that is derived from *Ackermann v. United States*, 340 U.S. at 199. *But see Pichardo v. Ashcroft*, 374 F.3d 46, 56 (2d Cir. 2004) (granting Rule 60(b)(6) relief based on a change in the controlling decisional law, because "[a]bsent a meaningful and substantive review of [the moving party's] case, manifest injustice will occur because the change in law goes to the very basis of [the party's] deportation").

On the other hand, in contrast to the decision below, these decisions also consistently reflect the principle that "the trial court is in a much better position [than the appellate courts] to pass upon the issues presented in a motion pursuant to Rule 60(b)." *Standard Oil Co. v. United States*, 429 U.S. 17, 19 (1976) (per curiam). Accordingly, as set out in the margin, the decisions consistently *uphold* the district court's exercise of discretion.[6]

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[6] *See Reform Party v. Allegheny County Department of Elections*, 174 F.3d 305, 311-12 (3d Cir. 1999) (en banc) (concluding that the district court did not abuse its discretion in denying relief where the intervening decision of this Court "did not overrule the holding of the [prior] panel," and where the moving party "chose not to petition for certiorari in the [prior] case"); *Dowell v. State Farm Fire & Casualty Automobile Insurance Co.*, 993 F.2d 46, 48 (4th Cir. 1993) (concluding that the district court did not abuse its discretion in denying relief where the movant deliberately chose not to appeal the original adverse ruling); *Cincinnati Insurance Co. v. Flanders Electric Motor Services*, 131 F.3d 625, 631 (7th Cir. 1997) (concluding that the "district court did not abuse its considerable discretion in determining that the change in state decisional law

(continued...)

But if these Rule 60(b)(6) issues are recurring, they are also occasions of confusion. One such occasion is the application of the principle that district courts have "discretion," *Browder*, 434 U.S. at 263 & n.7—or as the Seventh Circuit has put it, "considerable discretion," *Cincinnati Insurance Co. v. Flanders Electric Motor Services*, 131 F.3d 625, 631 (7th Cir. 1997)—in granting or denying relief pursuant to Rule 60(b)(6). For example, despite this Court's statement that "the trial court is in a much better position" to resolve Rule 60(b) issues, *Standard Oil*, 429 U.S. at 19, and its own acknowledgment that "a decision to reopen an action under Rule 60(b) will necessarily require fact-intensive weighing of the equities in a particular case," *DeWeerth v. Baldinger*, 38 F.3d 1266, 1271 (2d Cir. 1994), the Second Circuit has *overturned* a district court's exercise of discretion in circumstances very similar to those in the Tenth Circuit's decision in *Pierce*. *See id.* at 1272-75 (reversing grant of relief under Rule 60(b)(6)). Although it reached the opposite result, the Second Circuit also *overturned* a district court's exercise of discretion in *Pichardo v. Ashcroft*. *See* 374 F.3d at 56 (reversing denial of relief under Rule 60(b)(6)).

Likewise, the decision below exhibits virtually no respect for the institutionally superior position of the district court. Indeed, it fails to mention, let alone give the district court credit for considering, that the denial of Rule 60(b)(6) relief in this case will leave the federal taxpayer "permanently out of pocket" almost $20 million plus interest due to the School Board's 1,570 false claims. *See* App. 24a.

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[6] (...continued)
resulting from [two] Indiana Supreme Court cases . . . created no extraordinary circumstances"); *Kansas Public Employees Retirement System v. Reimer & Koger Associates*, 194 F.3d 922, 926 (8th Cir. 1999) (finding "no abuse of discretion in the district court's ruling" denying relief where the court "properly g[a]ve weight to equitable considerations," including conduct by the moving party that was "objectively unreasonable and done in bad faith"), *cert. denied*, 529 U.S. 1004 (2000).

Another occasion for confusion is exemplified by two of Judge Easterbrook's opinions for the Seventh Circuit. In *Tonya K. v. Board of Education*, 847 F.2d 1243, 1249 (7th Cir. 1988), the court of appeals affirmed the district court's decision to reopen a case under Rule 60(b)(6) to afford the plaintiffs the advantage of an intervening statutory amendment crafted to overrule *Smith v. Robinson*, 468 U.S. 992 (1984). That reopening "was necessary to afford the plaintiffs treatment similar to that received by others who were fortunate enough to receive final judgment before *Smith*." 847 F.2d at 1249. The district court faced "a hard choice," but its choice to reopen the judgment was affirmed because the court "resolved it in a principled way." *Id.*

By contrast, in *Norgaard v. DePuy Orthopaedics*, 121 F.3d 1074, 1076 (7th Cir. 1997), the court of appeals seemed to suggest that the choice to reopen a final judgment based on an intervening change in the law could not possibly be affirmed. While *Polites v. United States*, 364 U.S. 426, 433 (1960), "raised the possibility that 'a clear and authoritative change in governing law' would justify reopening" a final judgment, that "door was closed again" in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). *Norgaard*, 121 F.3d at 1076. Thus, the Seventh Circuit per Judge Easterbrook expressly took aim at the Tenth Circuit's decision in *Pierce*, concluding that the circumstances presented by that case are "not strong enough, given *Plaut*," to successfully invoke Rule 60(b)(6). 121 F.3d at 1078; *cf. id.* ("Thus it can be no surprise that other circuits have not followed *Pierce*.").

If the decade-old decision in *Plaut* has indeed rendered Rule 60(b)(6) a nullity in cases involving changes in controlling decisional law, only one court appears to know it. That ignorance, together with both the confusion in applying the abuse-of-discretion standard and the recurring character of the issue, confirm that the Court should take up the question presented.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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